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Immigration Litigation Bulletin

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Inside

Asylum Applicant Was Persecuted on Account of "Other Resistance" Because the Forced IUD Insertion Was Accompanied by Threats and Economic Deprivations

In ***Fei Mei Cheng v. U.S. Attorney General***, __ F.3d __, 2010 WL 3896198 (3rd Cir. October 6, 2010) (*Fuentes*, Aldissert, Roth), the Third Circuit, while upholding the BIA's finding that the insertion of an intrauterine device (IUD) was not per se persecution, held that petitioner, Cheng, was eligible for asylum under the "other resistance" provision of INA § 101(a)(42), because she had shown "resistance" to China's population control policies, had received threats and other economic deprivations which in the aggregate constituted persecution, and that the persecution had been on account of her resistance to those policies.

Cheng, a native of China, became pregnant in 1996 while living in China's Fujian Province. However, under Chinese law she was too young to marry her boyfriend. Over the course of her pregnancy, local family planning officials employed a pattern of escalating threats in an effort to persuade her to abort the pregnancy, but Cheng resisted and gave birth to a daughter on January 1, 1997. In response to her resistance to the population control laws and to induce her to undergo a sterilization procedure, the officials confiscated the family farm and truck, forbade Cheng from working on the farm, threatened to take her new-

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AAG Tony West's Remarks at 14th Annual OIL Immigration Litigation Conference

Assistant Attorney General Tony West, delivered the following remarks at OIL's 14th Annual Immigration Litigation Conference, held at the National Advocacy Center on September 27–October 1, 2010.

It's always good to be back here at the NAC. I was among the first students to come through here when the NAC opened just over a decade ago and I never pass up an opportunity to come back and enjoy the cafeteria's cheese grits. It's also a pleasure to be here with you this morning, at the start of OIL's annual conference. This conference has become an important, regular offering here at the NAC, and I want to thank Mike Bailie and his folks for recognizing the value of this gathering.

And I want to thank you, the public servants who earn the trust of the American people every day in the critically important work you do. The matters you handle touch on nearly every

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Forced IUD insertion not per se persecution

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born daughter away from her, and imposed various economic and other sanctions. Cheng was ultimately forced to have an IUD inserted, and soon thereafter in 2000, she and her boyfriend paid snakeheads to smuggle them out of China and into the United States.

Shortly after her arrival to the United States, Cheng was placed in removal proceedings where she applied for asylum as "person who has been forced to . . . undergo involuntary sterilization, or who has been persecuted for . . . other resistance to a coercive population control program" under INA. § 101(a)(42). When the hearing of the merits was convened on November 1, 2005, Cheng had given birth to a second child and was pregnant with a third child. The IJ found Cheng's testimony credible and initially granted asylum finding a well-founded fear of persecution because she had three children, with two of them being unauthorized. On appeal, the BIA remanded the case to the IJ in light of two published BIA decisions. Upon reconsideration the IJ denied the application for asylum and Cheng appealed to the BIA. The BIA upheld the denial and it relied primarily on *Matter of M-F-W- & L-G-,* 24 I&N Dec. (BIA 2008), a precedent decision issued after the IJ's second opinion. In that case, the BIA held (1) that the insertion of an IUD does not constitute persecution in and of itself absent aggravating circumstances, and (2) that the reinsertion of an IUD typically is not persecution on account of resistance to a family planning program, since women in China whose IUDs fall out or are removed always have the devices reinserted, whether or not they resisted the family planning program. Applying *M-F-W-&L-G-* to Cheng's claim, the BIA held that the IUD insertion did not constitute persecution and, alternatively, even if it had been persecution, Cheng had failed to establish a nexus between the acts complained of and her resistance to China's family planning program.

The court theld that the BIA's interpretation that forced IUD insertion was insufficiently permanent to constitute sterilization was a permissible construction of the statute.

In her petition for review to the Third Circuit, Cheng contended that being compelled to wear an IUD and being subject to regular gynecological examinations was tantamount to "sterilization". Alternatively even if it was not "sterilization," Cheng argued that she was entitled to asylum because she had been persecuted and had a well-founded fear of persecution on account other resistance to China's population control policies.

The Third Circuit first considered whether the BIA's interpretation of the statutory term "sterilization" under *Matter of M-F-W-& L-G-,* was entitled to deference. Applying the *Chevron* two-step analysis, the court found that the term "involuntary sterilization" was ambiguous, rejecting petitioner's contention that the insertion of an IUD was a form of sterilization. The court explained that the term contemplates a permanent inhibition of reproductive capacity, and that Congress had not directly spoken to "the precise question of whether compelled IUD insertion, plus monitoring falls within the ambit of the statutory term." The court then held that the BIA's interpretation that forced IUD insertion was insufficiently permanent to constitute sterilization was "not only a permissible construction of the statute's terms, but it also finds support in the legislative history of IIRIRA."

Second, the court considered Cheng's contention that she was eligible under the "other resistance" provision. The court explained that under *Matter of M-F-W- & L-G-,* the asylum applicant must prove that "(1) she resisted China's family planning policy, (2) she has been persecuted (or has a well-founded fear of persecution), and (3) the persecution was or would be because of the respondent's resistance to the policy." Here, the court determined that because Cheng had resisted the population control policies – noting that the BIA had assumed as much – she met the first requirement. The court then disagreed with the BIA's conclusion that Cheng had not been subject to persecution. In *Matter of M-F-W- & L-G-* the BIA held that IUD insertion is not "persecution" in the absence of "aggravating circumstances." The court found that in deciding Cheng's claim, the BIA had only focused on the IUD insertion and had not considered the cumulative effect of her experience. In particular, the court found that the BIA had not taken into account the serious threats that had been leveled at her, the fact that the IUD procedure had been performed in a hurried and improper manner, and that she had been subject to economic sanctions. When considered in the aggregate, the court held, these experiences amounted to past persecution.

Third, and finally, the court found that there was direct evidence in the record to compel the conclusion that Cheng had been harmed on account of resistance to China's family planning policies. The court rejected the BIA's conclusion that the only relevant act of mistreatment to establish the nexus was the IUD insertion. "No reasonable adjudicator could conclude that these events were 'unconnected' to Cheng's acts of resistance," said the court.

Accordingly, the court held that Cheng had been persecuted on account of her resistance to China's coercive population control policies and remanded the case to the BIA for its exercise of discretion.

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No Harm, No Foul: When Must Aliens Demonstrate Prejudice When Immigration Officials Violate Their Own Regulations?

A government agency "must scrupulously observe rules, regulations, or procedures which it has established" and "when it fails to do so, its action cannot stand and courts will strike it down." *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Lest the reader get too comfortable with this legal maxim, it is also a "general principle that 'it is always within the discretion of . . . an agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953); *see also Leslie v. Att'y Gen.*, 611 F.3d 171, 176 (3d Cir. 2010) ("not every promulgated regulation is of such a nature that a violation should invalidate agency action."). This article explores the tension between these seemingly contradictory principles and summarizes circuit precedent in an effort to help litigators reconcile them.

"Where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute," the Second Circuit will invalidate the challenged proceeding "only upon a showing of prejudice to the rights sought to be protected by the subject regulation."

In the immigration context, the various circuits have navigated the waters of agency noncompliance differently. In *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979), the Ninth Circuit rejected the government's argument that violations of INS regulations invalidate deportation orders only where the violation denies due process or fundamental fairness in the deportation hearing, as well as the contrary argument that any violation of regulation automatically invalidates the deportation, without regard to whether the alien suffered prejudice. Instead, the court adopted a two-part analysis to be applied when determining whether agency violation of its own regulations invalidates an underlying removal order. First, the court must determine whether the regulation "serves a purpose of benefit to the alien" and second, if it does, violation of such regulation will render the removal unlawful "only if the violation prejudiced interests of the alien" and such prejudice "relate[d] to the interests protected by the regulation." *Id.*; *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980).

This test was applied as recently as September in *United States v. Ramos*, __ F.3d __, 2010 WL 3720208 (9th Cir. Sept. 24, 2010). In *Ramos*, the Ninth Circuit declined to dismiss the indictment against an alien charged with unlawful reentry after deportation despite the court's finding that the Immigration Judge and DHS violated 8 C.F.R. § 1003.25(b) by failing to determine whether his waiver of his appeal rights was "voluntary, knowing, and intelligent." *Id.* at *9. Despite finding Ramos's stipulated removal proceedings "invalid," the Court affirmed the district court's denial of Ramos's motion to dismiss the indictment because Ramos failed to establish prejudice as he was statutorily ineligible for relief. *Id.* at *10; *see also United States v. Gonzalez-Valerio*, 342 F.3d 1051 (9th Cir. 2003) (refusing to dismiss alien's indictment for unlawful reentry despite alien not being informed of his right to seek relief under former section 212(c) of the Immigration and Nationality Act ("INA") in underlying proceedings where alien could not establish prejudice due to statutory ineligibility for relief).

The Board adopted the Ninth Circuit's two-prong approach in *Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980); *see also Matter of Hernandez*, 21 I&N Dec. 224 (BIA 1996). Setting forth the "general rule" that aliens must "specifically demonstrate" prejudice resulting from the agency's regulatory violation, the Board further clarified that prejudice may be presumed where (1) "compliance with the regulation is mandated by the Constitution," and (2) "an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency." *Matter of Garcia-Flores*, 17 I&N Dec. at 329. *See also Martinez-Camargo v. INS*, 282 F.3d 487, 491 (7th Cir. 2002) (adopting the Board's approach in *Matter of Garcia-Flores* because it "strikes the proper balance" between the need for agencies to follow their own rules and the "practical reality" that not every violation impacts substantive rights).

The Fourth Circuit voiced its approval of the Ninth Circuit's test, as adopted by the Board in *Garcia-Flores*, in *Delgado-Corea v. INS*, 804 F.2d 261 (4th Cir. 1986). In *Delgado*, the court held that INS's failure to provide the alien with a list of free legal services available where the deportation hearing was to be held, in contravention of former 8 C.F.R. § 242.1(c), was not actionable because the alien failed to demonstrate prejudice where she waived her right to counsel at the deportation hearing. *Id*. at 263.

The Second Circuit took a very different approach, however, to a similar regulatory violation in *Picca v. Mukasey*, 512 F.3d 75 (2d Cir. 2008). In *Picca*, the court found that the Immigration Judge violated 8 C.F.R. § 1240.10(a) when he failed to explain that free legal ser-

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No harm, no foul

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vices might be available to the alien, did not ascertain that Picca had received a list of these services, and no list appeared in the record. *Id.* at 79. Declining to adopt the *Calderon-Medina* approach, the Second Circuit found that the Immigration Judge's failure to follow these established procedures "constitute[d] 'reversible error,' without a showing of prejudice, because . . . the right to counsel concerns 'fundamental notions of fair play underlying the concept of due process,' and 'remanding for agency compliance with its own rules would actively encourage such compliance.'" *Id*., quoting *Montilla v. INS*, 926 F.2d 162, 167, 169 (2d Cir. 1991).

On the other hand, the Second Circuit has held that "where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute," the court will invalidate the challenged proceeding "only upon a showing of prejudice to the rights sought to be protected by the subject regulation." *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (failure to notify alien of his right to contact consular or diplomatic authorities in his country of nationality and to properly certify his case to the Board did not warrant remand in the absence of prejudice, where neither regulation "implicate[d] fundamental rights with constitutional or federal statutory origins"); *see also Ali v. Mukasey*, 524 F.2d 145 (2d Cir. 2008) (termination of removal proceedings not required, absent prejudice, despite DHS's failure to allow aliens to withdraw their asylum applications in contravention of 8 C.F.R. § 103.2 (b)(6), because the regulation primarily addresses procedure, rather than an underlying fundamental constitutional or statutory right); *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) ("[P]re-hearing regulatory violations are not grounds for termination, absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights.").

The Third Circuit has adopted a similar approach. In *Chong v. INS*, 264 F.3d 378 (3d Cir. 2001), the court required a showing of prejudice to obtain a new removal hearing based on the Immigration Judge's failure to notify the parties in the Notice of Certification to the Board that they had a right to make representations before that entity. The court classified former 8 C.F.R. § 3.7, also at issue in *Waldron*, as procedural in nature, and agreed with the Second Circuit that it was not "grounded in any underlying fundamental constitutional or statutory right." *Id*. at 390, quoting *Waldron*, 17 F.3d at 518.

The Fifth Circuit, too, appears more willing to excuse violations of agency regulations that are not grounded in the Constitution or federal statute.

Not until July 2010 did the Third Circuit "formulate a framework" governing the inverse: "violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief." *Leslie*, 611 F.3d 171. Mindful of the goal posts set by prior precedent addressing these issues, the court stated:

> "[W]e believe a prejudice rule that distinguishes between regulations grounded in fundamental constitutional or statutory rights and agency-created benefits successfully [distinguishes between exempted] procedural regulations [and] regulatory violations [that] are so serious as to merit judicial relief. We also agree that, absent prejudice, when a violation of immigration regulations implicates less than fundamental rights, wholesale remand places an "unwarranted and potentially unworkable burden on the agency's adjudication of immigration cases."

Id. at 178-79.

The Fifth Circuit, too, appears more willing to excuse violations of agency regulations that are not grounded in the Constitution or federal statute. In *Arzanipour v. INS*, 866 F.2d 743 (5th Cir. 1989), the court upheld the Board's dismissal of the alien's appeal despite the Immigration Judge's failure to inform the alien of his right to appeal. The court observed that "failure of an agency to follow its own regulations is not . . . a per se denial of due process unless the regulation is required by statute." *Id.* at 746. Despite finding that the regulation at issue, former 8 C.F.R. § 3.3, "not required by statute," the court analyzed alleged prejudice to the alien anyway, noting that Arzanipour apparently learned of his right to appeal prior to the deadline but not how long he had to file his appeal. Because the regulation required the Immigration Judge inform aliens of their appeal right, not the time frame, the court found that the Immigration Judge's failure "did not result in substantial prejudice to the petitioner." *Id.*

Just as it is true that "agencies must comply with their own regulations," it is equally clear that "an administrative agency is not a slave of its rules." *Ramos-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984); *Waldron,* 17 F.3d at 518. Case law addressing agency violations of their regulations reflects jurists' efforts, some more success-

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FURTHER REVIEW PENDING: Update on Cases & Issues

Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit will hear oral argument on rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the BIA determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009). The court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard argument in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court will consider the following question: Does defendant's inability to claim derivative citizenship through his U.S. citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326 The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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Due Process — Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion.

The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c), where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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Convictions — State Expungements

On December 14, 2010, the Ninth Circuit will hear oral argument on en banc rehearing in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel had applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

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Aggravated Felony — Pre-1988

On June 14, 2010, the government filed a petition for rehearing en banc in ***Ledezma-Garcia v. Holder***, (9th Cir. 2010), where the Ninth Circuit had held that the Anti-Drug Abuse Act of 1988, that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988. The petitioner had been order removed from the U.S. based on his commission of an aggravated felony of sexually molesting a minor. The question presented to the court is whether the Anti-Drug Abuse Act that made aliens deportable for aggravated felony convictions applies to convictions entered prior to its enactment on November 18, 1988.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Fist Circuit Upholds Denial of Removal of Conditional Residence Where Petitioner Had committed Marriage Fraud

In **Pena-Beltre v. Holder**, __ F.3d __, 2010 WL 3991694 (1st Cir. Oct. 13 2010) (*Lynch*, Selya, Boudin), the First Circuit upheld the BIA's denial of petitioner's request for removal of the conditions on his conditional lawful residence status and voluntary departure. The petitioner entered the United States illegally on September 1, 1996 and on January 25, 2001, married a United States citizen. Based on that marriage, two weeks later petitioner applied for adjustment of status. On April 12, 2002, petitioner and his wife were interviewed by INS adjudicator where they claimed they had married for love and resided together as husband and wife. Petitioner was then granted conditional residence status.

The First Circuit found the evidence of marriage fraud "so overwhelming that it hardly needs detailing."

On March 1, 2004, petitioner and his wife filed an I-751 joint petition to remove the conditions on petitioner's LPR status. In response to the filing, they were again subject to separate interviews. The adjudicator found inconsistencies in their separate statements and oral testimony. Petitioner's wife then confessed that they had married for money. Apparently, petitioner's wife had also contacted INS following their marriage stating that the marriage was fraud and that petitioner had only paid $500 instead of the promised $2,000. Following the interview, petitioner was subject to a pat down search and the ICE investigator discovered handwritten notes which appeared to be answers prepared in anticipation of questions about the contents of their apartment, the patterns of their daily living, and the members of his wife's family. Petitioner was then served with an NTA and charged with removability has an alien who sought to procure immigration status by fraud.

On April 11, 2006, petitioner filed another I-751 petition claiming eligibility on the basis that he had married in good faith but his marriage had ended in divorce. At the hearing petitioner did not testify but he presented testimony from his neighbors. The government presented the testimony of petitioner's former spouse. However, when she took the stand, she said that they had married for love and that the government had pressured her in signing a sworn-statement even though it was false. The government trial attorney the introduced testimony about a conference call on the previous day when she admitted that her marriage to petitioner had been fraudulent. The IJ did not believe her story, denied petitioner's request for removal of the condition and voluntary departure. The BIA affirmed finding no evidence that the marriage had been performed in good-faith.

The First Circuit found the evidence of marriage fraud "so overwhelming that it hardly needs detailing," and rejected the petitioner's argument that DHS should have produced the videotape of the marriage interview. The court also held that it lacked jurisdiction to review the denial of voluntary departure.

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■ First Circuit Holds Chinese Alien, Whose Previous Falun Gong Claim Was Found Not Credible, Failed To Establish Changed Country Conditions For Falun Gong Practitioners

In ***Le Bin Zhu v. Holder***, __ F.3d __, 2010 WL 4010125 (1st Cir. October 14, 2010) (Lynch, Boudin, Lipez), the First Circuit held that the BIA's did not abuse its discretion by denying the alien's untimely motion to reopen based on changed country conditions. The alien had previously sought asylum on account of his Christian faith and practice of Falun Gong. The agency found these claims not credible. In an untimely motion to reopen, the petitioner alleged changed country conditions for Falun Gong practitioners, submitting an affidavit from his mother and an unauthenticated village notice. The court explained that the self-serving affidavit from the alien's mother and the unauthenticated village notice merited little evidentiary weight, in light of the prior adverse credibility determination.

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SECOND CIRCUIT

■ Second Circuit Holds That Alien Convicted Of State Drug Offense Remains "Convicted" For Immigration Purposes, Notwithstanding State's Certificate Of Relief

In ***Wellington v. Holder***, 623 F.3d 115 (2d Cir. 2010) (Walker, Cabranes, Scheindlin) (*per curiam*), the Second Circuit held, in a matter of first impression, that an alien convicted of a state drug possession offense remained "convicted" of the offense for immigration purposes after receiving a Certificate of Relief.

The petitioner, a citizen of Jamaica, entered the United States

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without inspection on or about January 23, 1981. On June 21, 1986, she married Steven Wellington, a United States citizen, and on October 29, 1989, she was granted temporary resident status under 8 U.S.C. § 1255a. On May 23, 1995, she was convicted in New York state court of criminal possession of a controlled substance in the seventh degree (cocaine), under N.Y. Penal Law § 220.03, and sentenced to 120 days in jail. On May 13, 1996, the INS sent her an order terminating her temporary resident status because of her drug conviction. On February 15, 2007, she was arrested and charged with removability as an alien who was unlawfully present in the United States without being admitted or paroled and as an alien convicted of a controlled substance offense (predicated on her 1995 cocaine conviction).

While her removal proceedings were pending, petitioner filed a motion to vacate her controlled substance conviction in New York state court claiming that she had not received effective assistance of counsel during the prior criminal proceedings. The state court denied her motion to vacate the conviction, finding that the record did not demonstrate ineffective assistance of counsel under federal or state constitutional standards. However, the court issued a Certificate of Relief from Disabilities arising out of the conviction, which it believed was warranted for rehabilitative and immigration purposes. The IJ determined that under the definition of "conviction," as explained by the BIA in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), no effect was to be given to a state rehabilitative action such as an expungement or Certificate of Relief, unless the state court action was related to a substantive or procedural defect in the underlying criminal proceeding.. Accordingly, the IJ determined that petitioner's controlled substance conviction subjected her to removal under and rendered her ineligible for cancellation of removal. The BIA affirmed for the same reasons.

The Second Circuit held that such state rehabilitative treatment did not preclude use of the underlying offense as a basis for removal under 8 U.S.C. § 1182(a)(2)(A)(i)(II) or as a basis for ineligibility for cancellation of removal under 8 U.S.C. § 1229b(b)(1), where the relief was not related to a procedural or substantive defect in the criminal proceedings, even where the alien would have been eligible for Federal First Offender Act (FFOA) treatment had she been charged with drug possession in federal court. The court found there was a rational basis for distinguishing between aliens whose criminal cases were dismissed under the FFOA and aliens who receive Certificates of Relief or similar state rehabilitative relief.

"Petitioner possessed the equivalent of 241 marijuana cigarettes, well beyond the single cigarette envisioned by Senator Kennedy and the Congress."

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THIRD CIRCUIT

■ **Third Circuit Holds That Alien's Conviction For Possession With Intent To Distribute 120.5 Grams Of Marijuana Constituted An Aggravated Felony**

In ***Catwell v. Holder***, 623 F.3d 199 (3d Cir. 2010) (Rendall, Jordan, *Greenaway*), the Third Circuit held that the alien's Pennsylvania conviction under 35 PA. STAT. ANN. § 780-113(a)(30), for possession with intent to distribute 120.5 grams of marijuana constituted an aggravated felony, thereby rendering him ineligible for cancellation of removal. Because the Pennsylvania statute was divisible, the court applied the modified categorical approach and considered the record of petitioner's state conviction to determine the factual basis of the conviction.

The court further determined that the alien possessed the equivalent of 241 marijuana cigarettes, noting that under the Sentencing Guidelines, one marijuana cigarette is equivalent to .5 grams. U.S.S.G. § 2D1.1. Given that criterion, said the court "petitioner possessed the equivalent of 241 marijuana cigarettes, well beyond the single cigarette envisioned by Senator Kennedy and the Congress," when they wrote the exemption for someone who possesses 30 grams or less of marijuana, describing this as an exception for personal use. 8 U.S.C. § 1227(a)(2)(B)(i).

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■ **Third Circuit Holds That For Purposes Of Continuous Residence Requirement The Residence Of Aliens' Parents Could Not Be Imputed To Aliens**

In ***De Leon-Ochoa v. Holder***, 622 F.3d 341 (3d Cir. 2010) (Fuentes, *Aldisert*, Roth), the petitioners challenged the BIA's denial of their applications for Temporary Protected Status ("TPS") for failure to personally satisfy the statutory requirements of "continuous residence" and "continuous physical presence." They also contended that they fulfilled the statutory requirement of "continuous residence," 8 U.S.C. § 1254a(c)(1)(A)(ii), via imputation of their parents' residence. Petitioners additionally contended that they satisfy the statutory requirement of "continuous physical presence," 8 U.S.C. § 1254a(c)(1)(A)(i), because the statutory term "most recent designation" rightfully is

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read to encompass TPS extensions as well as designations. The government argued that the plain text of the statute, the implementing regulations, and the consistent position of the Attorney General require applicants to individually satisfy the "continuous residence" requirement.

The court held that, for purposes of the continuous residence requirement for TPS, the residence of the aliens' parents could not be imputed to aliens.

The Third Circuit agree with the government's position. The court held that, for purposes of the continuous residence requirement for TPS, the residence of the aliens' parents could not be imputed to aliens, and the statutory term "most recent designation" applied to the original designation of a country for temporary protected status and not to subsequent extensions.

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■ **Third Circuit Upholds Denial Of Motion To Reopen Where Alien Made No Affirmative Efforts To Update His Address Despite Being Informed Of The Obligation**

In ***Ramos-Olivieri v. Holder***, __ F.3d __, 2010 WL 3610185 (3d Cir. October 17, 2010) (Sloviter, *Barry*, Smith), the Third Circuit held that the BIA acted within its discretion in denying a motion to reopen filed by an alien who had been ordered removed *in absentia* and then subsequently married a naturalized citizen.

The petitioner, a citizen of Uruguay, entered the United States in February 2001 as a nonimmigrant visitor with authorization to stay for six months. He overstayed his visa. On April 6, 2004, DHS issued a warrant for his arrest and took him into custody. Petitioner was personally served with NTA charging which indicated petitioner's address, and, according to the NTA, he was orally notified in Spanish of the charges against him and the consequences of failing to appear for his removal hearing. The NTA stated in English that an alien is required to immediately inform the Immigration Court of a change in address. Petitioner then changed address without notifying immigration authorities. The Immigration Court sent him a Notice of Hearing by regular mail to the address on the NTA, for a hearing to take place on January 5, 2005. The hearing took place in petitioner's absence and he was ordered removed in absentia to Uruguay. In April 2007, petitioner filed a motion to reopen removal proceedings pursuant to 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2), claiming that he had never received notice of the hearing. The IJ denied the motion, and the BIA affirmed.

The case was later remanded to the BIA to reconsider its decision in light of *Santana Gonzalez v. Attorney General*, 506 F.3d 274 (3d Cir. 2007). The BIA again denied the motions and distinguished *Santana Gonzalez* by noting that, although the alien there was no longer at the address she had provided, a responsible person was available at the address to forward her mail. Because petitioner had not provided notice of a change of address, the BIA again concluded that notice was not required under 8 U.S.C. § 1229a(b)(5)(B).

The court agreed with the BIA, explaining that unlike the alien in *Santana Gonzalez*, petitioner "made no arrangements with a responsible person to forward his mail nor did he provide the postal service with a forwarding address." The court also noted tht petitioner did not even assert that he was eligible for any form of relief from removal (except voluntary departure) prior to his marriage to a U.S. citizen in March 2007. "He thus would have had an incentive to avoid his removal hearing. Accordingly, an evidentiary hearing was not called for and the BIA acted within its discretion in denying his motion to reopen," concluded the court.

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FIFTH CIRCUIT

■ **Abandonment Of LPR Status While A Habeas Petition Is Pending Does Not Deprive The BIA Of Jurisdiction Over A Remanded Appeal**

In ***Rodriguez-Barajasv. Holder***, __ F.3d __, 2010 WL 4075078 (5th Cir.October 19, 2010) (Davis, *Smith*, Southwick), in a published decision, , the Fifth Circuit remanded the BIA's decision that it lacked jurisdiction over the alien's appeal. Prior to the Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), the BIA held the alien was an aggravated felon because of his Texas felony drug possession conviction. The alien filed a habeas petition, but while it was pending, he voluntarily relinquished his LPR status and left the United States. The habeas resulted in remand to the BIA, but the BIA concluded it lacked jurisdiction under 8 C.F.R. § 1003.4. The Fifth Circuit held the departure bar did not apply based on the plain language of the regulation, because the BIA had issued a "final" decision that was actively on habeas review prior to the alien's departure.

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■ **Fifth Circuit Upholds Finding That Alien's Conviction For Aggravated Assault Constitutes A Crime Of Domestic Violence Pursuant To 8 U.S.C. § 1227(a)(2)(E)(i)**

In ***Bianco v. Holder***, __ F.3d __, 2010 WL 4069531 (5th Cir. October 19, 2010) (Clement, *Southwick*, Haynes), the Fifth Circuit upheld the

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BIA's holding that the alien's conviction for aggravated assault constituted a crime of domestic violence pursuant to 8 U.S.C. § 227(a)(2)(E)(i). In particular, relying on the Supreme Court's decisions in *United States v. Hayes,* 129 S. Ct. 1079 (2009), and *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009), the court held that the domestic relationship that must exist for application of Section 1227(a)(2)(E)(i) can be proven by evidence generally admissible for proof of facts in administrative proceedings, in this case the affidavit of probable cause and criminal complaint.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds It Lacks Jurisdiction To Review An Immigration Judge's Denial Of Continuance**

In ***Pawlowska v. Holder***, __ F.3d __, 2010 WL 4137567 (7th Cir. October 22, 2010) (Wood, *Evans*, Tinder), the Seventh Circuit, held that it lacked jurisdiction under INA § 242(a)(2)(B)(i) to review an immigration judge's continuance denial where such a denial was "ancillary to an adjustment of status application," and was based on the immigration judge's determination that he would ultimately deny the alien's adjustment of status application as a matter of overall discretion.

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■ **Seventh Circuit Upholds Denial Of Petitioner's Ineffective Assistance Of Counsel And Adverse Credibility Claims**

In ***Toure v. Holder***, __ F.3d __, 2010 WL 3928694 (7th Cir. October 8, 2010) (Flaum, Evans, *Williams*), the Seventh Circuit held that the agency's adverse credibility finding was supported by specific, cogent reasons, including several discrepancies between the petitioner's testimony and her asylum applications, which, when taken as a whole, cast serious doubt on her claims.

The court also agreed with the agency that, even if petitioner were assumed to be credible, she still failed to establish that the attacks on her family constituted persecution or were related to political opinion or any other protected ground. Regarding petitioner's motion to reopen, the court held that the agency did not abuse its discretion in denying her motion to reopen on ineffective assistance of counsel grounds where she had not shown that the newly-proffered evidence was previously unavailable, or that she had suffered prejudice as a result of the alleged ineffective assistance of counsel.

The court ruled the plain language of the Alaska coercion statute was broader than the generic federal definition, which requires use or threatened use of physical force against a person.

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NINTH CIRCUIT

■ **Ninth Circuit Holds That Conviction Under Alaska "Coercion" Statute Is Not Categorically A Federal Crime Of Violence**

In ***Cortez-Guillen v. Holder***, 623 F.3d 933 (9th Cir. 2010) (Hawkins, McKeown, *Bea*), the Ninth Circuit held that an Alaska criminal law prohibiting "coercion" does not automatically equate with a federal "crime of violence," as the BIA had determined. The petitioner, a citizen of Mexico, entered the United States on July 6, 1973, as a lawful permanent resident. On June 16, 2006, he was arrested and charged with sexual abuse of a minor in the second degree, in violation of Alaska Statute § 11.41.436(a)(2). That charge was ultimately dropped and, on September 16, 2008, he instead pleaded guilty to one count of coercion, in violation of Alaska Statute § 11.41.530(a)(1). He was sentenced to four years in prison.

The court ruled the Alaska coercion statute provided the fear instilled in the victim could be physical injury or any other crime, and had not been interpreted more narrowly by Alaskan courts. As such, the court ruled the plain language of the Alaska coercion statute was broader than the generic federal definition, which requires use or threatened use of physical force against a person.

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■ **Ninth Circuit Rules That CAT Protection Is Available Even If Alien Could Avoid Torture By Avoiding Political Activities**

In ***Edu v. Holder***, __ F.3d __, 2010 WL (9th Cir. October 26, 2010) (Ferdinand, Silverman, Duffy (S.D.N.Y.)), the Ninth Circuit reversed the BIA's holding denying CAT protection to an applicant from Nigeria. The court found the alien had suffered past torture, including female genital mutilation, in Nigeria before coming to the U.S. in 1989. She lost LPR status due to an aggravated felony in California and filed for CAT protection. The BIA reversed the Immigration Judge's grant of CAT, and the alien filed a motion to reopen her proceedings, which the Board denied.

The Ninth Circuit considered the initial CAT decision on the merits, and held CAT protection cannot be denied based on the ability to avoid torture by refraining from political activity. The Ninth Circuit directed relief but remanded for consideration of the female genital mutilation claim.

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TENTH CIRCUIT

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■ **Tenth Circuit Upholds Finding That Alien Did Not Establish That His Political Opinion Was One Central Reason Why Maoists Targeted Him**

In ***Dallakoti v. Holder***, 619 F.3d 1264 (10th Cir. 2010) (*Tacha*, Lucero,Murphy), the Tenth Circuit affirmed the BIA's denial of petitioner's asylum claim based on Maoists threats in Nepal. The petitioner claimed that in Nepal he was persecuted by the Maoists not only because he was a successful businessman, but also on account of his family's political opinions, which he claimed should be imputed to him.

As a result of the divorce, plaintiff could not meet the requirement because he applied for naturalization only three years after becoming a lawful permanent resident.

Preliminarily, the court deferred to the BIA's interpretation in *Matter of J-B-N &S-M-*, 24 I&N Dec. 208 (BIA 2007), that the one central reason for the persecution must be on account of the five protected grounds. The court then held that the record contained scant and inconsistent testimony about petitioner's political opinion, and thus lacked the compelling evidence required to overturn the BIA's finding that the Maoists' threats were motivated by petitioner's ability to supply needed financial resources.

The court also ruled that the BIA did not abuse its discretion in denying petitioner's request for a remand because the new evidence was cumulative and/or insufficient to require a remand.

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DISTRICT COURTS

■ **Southern District Of California Grants Government's Motion For Summary Judgment In Naturalization Case Where Alien Failed To Meet The Five-Year Residency Requirement**

In ***Alenazi v. USCIS*** No. 09-cv-2053 (S.D. Cal. October 12, 2010) (Sabraw, J.), the district court granted the government's motion for summary judgment on plaintiff's naturalization claim. Plaintiff applied for naturalization on the basis of his marriage to his United States citizen wife, three years after obtaining lawful permanent residency. But plaintiff divorced his wife while his naturalization application was pending.

Thus, the court held, as a result of the divorce, the five-year residency requirement for naturalization applied to plaintiff, and plaintiff could not meet that requirement because he applied for naturalization only three years after becoming a lawful permanent resident. Therefore, the court held that plaintiff was ineligible for naturalization.

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■ **District Court For Northern Mariana Islands Holds Aliens' Presence In CNMI Did Not Count Toward The Residency And Physical Presence Requirements For Naturalization**

In ***Eche v. Holder***, __ F. Supp. 2d __, 2010 WL 3911274 No. 1:10-cv-00013 (D. N. Mar. I. October 7, 2010) (Pro, J), the district court granted the government's motion for summary judgment, holding that the alien's residence in the Commonwealth of the Northern Mariana Islands (CNMI) prior to the effective date of the Consolidated Natural Resources Act of 2008 (CNRA) did not count towards the residency and physical presence requirements for aturalization. The court held the plain language of CNRA's Section 705(c) shows Congress only intended that an alien's presence in the CNMI "before, on, or after" the CNRA's enactment counts as presence in the United States "for the purpose only of determining whether an alien lawfully admitted for permanent residence . . . has abandoned or lost such status by reason of absence from the United States." Accordingly, an alien's presence in the CNMI did not count as continuous residency in the United States or physical presence in the United States for purposes of the naturalization requirements.

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■ **Northern District Of Illinois Dismisses APA And Constitutional Claims For Lack Of Jurisdiction**

In ***Akram v. Napolitano***, No. 10-cv-1415 (N.D. Ill. October 27, 2010) (*Holderman*, C.J.), the district court dismissed the alien's action alleging claims under the Administrative Procedure Act, the Due Process Clause, and the Equal Protection Clause. The alien asked the court to: (1) declare her eligible to adjust her status to legal permanent resident; (2) declare that the adjustment of status regulation, as it relates to certain visa holders, is ultra vires to the adjustment statute; and (3) declare that the same regulation violates the Equal Protection Clause.

The court held that it lacked jurisdiction because, after the alien filed her complaint, the immigration court ordered her removed. Because of the removal order, the court concluded that it lacked jurisdiction pursuant to the Immigration and Nationality Act, which states that a petition for review filed in the court of appeals is "the sole and exclusive means for judicial review of an order of removal."

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This Month's Topical Parentheticals

ASYLUM

■ ***Toure v. Holder,*** __ F.3d __, 2010 WL 3928694 (7th Cir. Oct. 8, 2010) (affirming denial of asylum application based on violence in Congo where petitioner failed to establish a nexus between the attacks and her "racial background" or political views (or those of her family), and where petitioner's testimony was "replete with material inconsistencies")

■ ***Dallakoti v. Holder,*** __ F.3d __, 2010 WL 3860994 (10th Cir. Oct. 5, 2010) (finding that substantial evidence supported BIA's determination that petitioner failed to establish that a central reason why Maoists targeted him was because of his or his family's political beliefs rather than his ability to provide them with needed financial resources)

ADJUSTMENT - CANCELLATION

■ ***Pena-Beltre v. Holder,*** __ F.3d __, 2010 WL 3991694 (1st Cir. Oct. 13 2010) (affirming IJ's and BIA's finding that petitioner failed to establish that his marriage to a U.S. citizen was made in good faith given the "overwhelming" evidence of marriage fraud, including prior admissions by both spouses that the marriage was entered into for immigration purposes)

■ ***Matter of Al Wazzan,*** 25 I.&N. Dec. 359 (BIA Oct. 20, 2010) (holding that, although section 204(j) of the INA provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job").

■ ***Valadez-Munoz v. Holder,*** __ F.3d __, 2010 WL ___ (9th Cir. Oct. 28, 2010) (upholding BIA's determination that petitioner falsely represented himself to be a citizen of the United States and is thus ineligible for adjustment; finding that substantial evidence supported BIA's determination that petitioner accepted the opportunity to withdraw his application for admission and depart voluntarily in lieu of being placed in removal proceedings, and accordingly his continuous physical presence was interrupted for purposes of cancellation of removal)

CAT

■ ***Edu v. Holder,*** __ F.3d __, 2010 WL __ (9th Cir. Oct. 26, 2010) (holding that the BIA erred in finding that petitioner, a citizen of Nigeria, was not entitled to CAT protection because she could have avoided torture by refraining from political activity)

CRIMES

■ ***Cortez-Guillen v. Holder,*** __ F.3d __, 2010 WL ___ (9th Cir. Oct. 5, 2010) (holding that a conviction under the Alaska "coercion" statute is not categorically a "crime of violence" because it criminalizes conduct that is broader than the federal definition)

■ ***Cheng v. Att'y Gen. of the United States,*** __ F. 3d __, 2010 WL 3896198 (3d Cir. Oct. 6, 2010) (holding that the BIA's interpretation of the statutory term "sterilization" is entitled to deference, and rejecting petitioner's argument that insertion of an IUD constitutes persecution *per se*; concluding, however, that the BIA's analysis of whether petitioner suffered persecution based on "other resistance" to China's family planning policies failed to take into account several acts of mistreatment, including severe economic sanctions, that were linked to petitioner's resistance) (Judge Roth concurred)

■ ***Catwell v. Att'y Gen. of the United States,*** __ F. 3d __, 2010 WL 3987664 (3d Cir. Oct. 13, 2010) (holding that petitioner's 2003 Pennsylvania conviction for possession with intent to deliver or manufacture 120.5 grams of marijuana constitutes an "aggravated felony" under the modified categorical approach because it did not fall within the exception established by 21 U.S.C. § 841(b)(4) for distributing a "small amount of marijuana for no renumeration")

■ ***Bianco v. Holder,*** __ F. 3d __, 2010 WL 4069531 (5th Cir. Oct. 19, 2010) (holding that under 8 U.S.C. § 1227(a), a crime of domestic violence need not have as an element the domestic relation of the victim to the defendant, and that the government, having the burden to prove the domestic relationship by clear and convincing evidence, may rely on the kind of evidence generally admissible before an IJ, including a probable cause affidavit and the criminal complaint)

■ ***Wellington v. Holder,*** __ F.3d __, 2010 WL 4103759 (2nd Cir. Oct. 20, 2010) (holding that an alien who receives state rehabilitative treatment for a removable offense remains "convicted" of that offense even if the alien would have been eligible for relief under the Federal First Offender Act had she been prosecuted in federal court)

■ ***Covarrubias v. Holder,*** __ F. 3d __, 2010 WL ___ (9th Cir. Oct. 26, 2010) (holding that the offense of shooting at an inhabited dwelling or vehicle in violation of Cal. Pen. Code § 242 is not categorically a crime of violence because it merely requires a *mens rea* of recklessness, and therefore does not, by its nature, involve a substantial risk of physical force against the person or property of another)

■ ***Matter of Gruenangerl,*** 25 I.&N. Dec. 351 (BIA Oct. 15, 2010) (holding that the crime of bribery of a public official in violation of 18 U.S.C. § 201 (b)(1)(A) is not an offense "relating to" commercial bribery and is therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(R)).

■ ***Mendoza v. Holder,*** __ F.3d __, 2010 WL ___ (9th Cir. Oct. 27, 2010)

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This Month's Topical Parentheticals

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(holding that the BIA's determination that robbery under Cal. Pen. Code § 211 is a crime involving moral turpitude is entitled to deference as it is consistent with its own precedent and that of the Ninth Circuit finding that theft crimes are CIMTs)

JURISDICTION

■ ***Ahmed v. Holder,*** __ F.3d __, 2010 WL ___ (2d Cir. Oct. 27, 2010) (holding that court lacks jurisdiction under section 242(a)(2)(B)(ii) to review the BIA's discretionary denial of a waiver of inadmissibility under INA § 237(a)(1)(H), and that the BIA did not abuse its discretion in denying petitioner's equitable estoppel claim where petitioner's testimony on this issue was inconsistent)

■ ***Thomas v. Att'y Gen. of the United States,*** __ F.3d __, 2010 WL __ (3d Cir. Oct. 26, 2010) (holding that the BIA's grant of a motion to reconsider did not moot a pending PFR where the new BIA decision did not vacate or materially alter the original decision)

■ ***Pawlowska v. Holder,*** __ F.3d __, 2010 WL 4137567 (7th Cir. Oct. 22 2010) (finding that court lacks jurisdiction under section 242(a)(2)(B)(i) to review the IJ's continuance denial where such denial is "ancillary to an adjustment of status application," and was based on the IJ's determination that he would ultimately deny adjustment as a matter of discretion)

■ ***Rodriguez-Barajas v. Holder,*** __ F.3d __, 2010 WL 4075078 (5th Cir. Oct. 19 2010) (holding that the departure bar at 8 C.F.R. § 1003.4 does not apply to withdraw an appeal to the BIA where petitioner departed the country *after* the BIA issued a decision on his appeal, but while his habeas petition was pending)

MTR

■ ***Zhu v. Holder,*** __ F.3d __, 2010 WL 4010125 (1st Cir. Oct. 14, 2010) (affirming denial of MTR for failure to establish changed circumstances where the BIA reasonably assigned little weight to the new evidence – a village committee notice – because it was unauthenticated and petitioner had been found not credible in the underlying proceedings; further finding that the BIA properly denied reopening because petitioner never established a credible asylum claim based on his practice of Falun Gong)

■ ***Ramos-Olivieri v. Att'g Gen. of United States,*** __ F.3d __, 2010 WL 3610185 (3d Cir. Sept. 17, 2010) (designated as published decision Oct. 22, 2010) (holding that BIA acted within its discretion in denying MTR by alien who had been ordered removed *in absentia* and then subsequently married naturalized citizen, where alien made no affirmative efforts to update his address despite being informed of this obligation, alien had incentive to avoid removal hearing, and alien did not make any arrangements for forwarding his mail)

NATURALIZATION

■ ***Eche v. Holder,*** __ F. Supp.2d __, 2010 WL 3911274 (D.N. Mar. I Oct. 7, 2010) (affirming CIS' denial of naturalization applications because plaintiffs' residence in the CNMI did not count for purposes of the physical presence requirement for a lawful permanent resident to naturalize, but rather constituted an absence from the United States which disrupted the continuous residence requirement)

■ ***Matter of Chawathe,*** 25 I.&N. Dec. 369 (AAO Oct. 20, 2010) (holding that, for purposes of establishing the requisite residence in naturalization proceedings pursuant to section 316 (b) of the INA, a publicly held corporation may be deemed an "American firm or corporation" if the applicant establishes that the corporation is both incorporated in the United States and trades its stock exclusively on U.S. stock markets)

TPS

■ ***De Leon-Ochoa v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 3817082 (3d Cir. Oct. 1, 2010) (holding that, for purposes of the continuous residence requirement for TPS, the residence of petitioners' parents could not be imputed to petitioners, and that the statutory term "most recent designation" applies to the original designation of a country for TPS and not to subsequent extensions)

TPS Extended for Somalia

DHS has announced that it will extend TPS for eligible nationals of Somalia from the current expiration of March 17, 2011, through the new expiration date of Sept. 17, 2012. During the past year, DHS and the Department of State have reviewed the conditions in Somalia.

Based on this review, Homeland Security Secretary Napolitano has determined that an 18-month extension is necessary because conditions that prompted the 2001 TPS re-designation of Somalia continue, and the return of individuals with TPS to Somalia would pose a serious threat to their personal safety.

Under the extension, individuals who have been granted TPS are eligible to re-register and maintain their status for an additional 18 months. . TPS does not apply to Somali nationals who first entered the United States after Sept. 4, 2001.

AAG Tony West's Remarks at 14th Annual Immigration Conference

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significant area of policy and law, from national security to the right to competent counsel.

Your cases are often at the center of national conversations about immigration reform and enforcement priorities; and the work you do helps to shape the contours of these critically important, often contentious debates. So I want to thank you for your service.

I also want to recognize the leadership of Thorn Hussey and Dave Kline. Both of these men have served under some of the most trying, most difficult circumstances faced by the Department of Justice. They have had to respond to shifting policy priorities and competing demands. And they have had to build capacity and expertise in appellate advocacy, national security, and a whole host of other disciplines as our responsibilities in immigration matters have expanded. I am grateful to have had their counsel during my sixteen months in this job and OIL is fortunate to have them at the helm.

And because of their leadership and the work that many of you are doing, OIL is continually getting better. I hear it from the appellate judges with whom I speak who tell me they have seen the quality of immigration-related cases and advocacy improve; I see it in the over 91% win rate our lawyers achieve in their cases; and I hear it from our federal partners like DHS, with whom we are enjoying regular, collaborative communication as we work toward the common goal of fulfilling our enforcement mission of securing our nation's borders.

So as we kick off this conference, I'd like to take a few moments to share my own perspective on what I believe it will take to ensure that we continue to serve the American people to the best of our abilities as attorneys engaged in the often difficult and complicated practice of immigration law and policy.

First, we must continue the work we've already begun in ensuring that our expertise in immigration matters, both within the Department of Justice and throughout the federal government, is shared broadly with other practitioners and policymakers, to help us pursue the best cases and achieve the right results.

To help achieve that, we've launched an effort within the DOJ that encourages lawyers from the Civil and Criminal Divisions, as well as EOUSA and the U.S. Attorneys Offices, to coordinate early in the life of an immigration matter so that the best thinking can be brought to bear on issues of common concern. We've also encouraged AUSAs and other federal attorneys to consult with experienced lawyers in the Civil and Criminal Divisions in Main Justice when they face unique, challenging, or cross-cutting issues.

Our continued success in fulfilling our mission requires clear, consistent and open communication among our federal partners charged with the responsibility of enforcing our immigration laws.

Because our DOJ OIL lawyers regularly deal with a variety of issues in immigration matters throughout the country, they are a useful resource and a conversation with one of them can save an attorney grappling with a difficult issue hours of research.

We're also offering more cross-training opportunities such as this conference and providing more valuable training tools –– from monographs to email listservs and intranet-based groups –– all designed to help you stay on top of the latest developments in the law and to help you identify trends that indicate where the law is going. All of these efforts are designed to make the best use of the talent and expertise we've developed in immigration law –– talent that you in this room represent and will reinforce by working with and consulting one another.

Second, our continued success in fulfilling our mission requires clear, consistent and open communication among our federal partners charged with the responsibility of enforcing our immigration laws with the intent of focusing our enforcement efforts in ways that will maximize the impact of our work. Toward that end, we've developed stronger ties between DHS and OIL over the past 16 months, holding regular leadership meetings to consult a variety of issues, from enforcement priorities to regulatory fixes to litigation strategy. A recurring theme in these meetings is how best to focus our work in OIL and DHS on the enforcement priorities as articulated by the President, the Attorney General and the Secretary of Homeland Security.

Our recent litigation against the State of Arizona, for instance, is the result of collaborative communication between DHS and DOJ, where we are seeking to ensure the effective enforcement of our national immigration laws in a manner that is consistent with federal immigration policies, practices, and priorities. And focusing on enforcement priorities is essential. As a federal prosecutor, I learned early on that if you want to have a significant impact on making a community safer, you go after the worst offenders –– that relatively small population of hardcore, often repeat criminals who are responsible for a majority of the crime.

We face a similar challenge in our civil immigration enforcement efforts. Faced with the reality that our colleagues at ICE only have resources to remove less than 4% of the nearly 11 million illegal aliens living in the United States today, we must direct our enforcement efforts toward those activities where they will make the biggest difference and reap the greatest benefit: such as pursuing aliens who pose a threat to public safety or

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AAG Tony West's Remarks

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national security; targeting recent illegal entrants and fugitive aliens, particularly those who are being sought by law enforcement in connection with other crimes; and directing our detention resources away from aliens who are disabled, elderly, pregnant or nursing.

DHS Assistant Secretary John Morton has explained these in more detail in a recent memorandum outlining ICE's civil enforcement priorities, but this is not ICE's responsibility alone.

This brings me to the third way I believe we can ensure we are serving the American people to the best of our abilities. In addition to better, more comprehensive training and consistent, clear communication with our federal partners about our enforcement priorities, efficient and effective deployment of our limited resources requires all of us –– DHS and DOJ officials alike –– to look at every case we handle as a opportunity to fulfill our highest duty: our duty to justice.

I've often recounted the experience I had as a young Main Justice attorney in the early 90's.

I was a special assistant in the Deputy Attorney General's office back then and had had the good fortune to do much of my work for then Attorney General Janet Reno. And just before I left Washington to begin work as an AUSA in the Northern District of California, where I'm from, Ms. Reno insisted on meeting with me, one-on-one. And during that meeting, she showed me the inscription in the walls just outside her private office, which reads, and I'm paraphrasing: The Government wins its case when justice is done. And she told me then that my role as a prosecutor was not merely that of an advocate seeking to win as many cases as I possibly could, but that my primary job was to do justice in every case I handled. Sometimes that meant pursuing the most severe penalties allowable under the law. And sometimes that meant deferring prosecution or advocating remand of a matter for reconsideration or sometimes even admitting government error.

And now, I ask the same of each of you. You will have matters that will require you to strike hard but fair blows, to seek every available sanction to advance our enforcement priorities and our enforcement mission. And you will also see cases that will require you to exercise the judgment of public servants who strive not only to win cases but also to do justice. Cases that will require you to consider remand according to the criteria outlined in Thom Hussey's remand guidance memo-criteria such as humanitarian concerns. Or cases that will require you to consider the difficult but necessary question of whether it makes sense to pursue removal in a particular case when the likelihood is that the alien will never, in fact, be removed when all is said and done.

You will have matters that will require you to strike hard but fair blows, to seek every available sanction to advance our enforcement priorities and our enforcement mission.

Now, the fact is, you are already doing this.

When justice requires that cases be reexamined, you have stood up to fulfill that duty. In a recent important case involving the failure to adjudicate an alien's adjustment application –– a situation that can lead to years of limbo for an alien seeking legal status –– OIL attorneys worked with our colleagues from USCIS and the U.S. Attorney's Office to obtain an exemption for an Iraqi alien.

Because of this alien's previous activities in Iraq, he was subject to the terrorism-related inadmissibility bar. But working together to take a closer look at the matter, DOJ and USCIS attorneys found that this alien had actually served as an interpreter for U.S. forces in Iraq and had received numerous commendations from senior Department of Defense officials for his assistance to our troops. That closer reexamination led to the alien's status being readjusted and the litigation dismissed as moot.

Or the recent case involving an alien who is a native of Haiti and the mother of six. She sought asylum based on three instances in which she contends she was beaten and raped by government-affiliated gangs because of her husband's political activities. Although the ultimate agency finding rested on an adverse credibility finding, the Immigration Judge who heard the matter stated in his decision that he was convinced the alien "suffered horrific physical violence" based on the evidence he heard. OIL attorneys appropriately remanded to allow the agency to reconsider whether, in light of these comments, the alien satisfied her burden of proof. And in so many ways, you are also focusing on pursuing those cases that fall squarely within our enforcement priorities and fulfill our enforcement mission.

Last year, for example, OIL attorneys secured an important Ninth Circuit victory when the removal order concerning a fundraiser for the Jammu and Kashmir Liberation Front was upheld. This was an important victory whereby we persuaded the court to reject several of the alien's claims that ran the spectrum from, he had ceased his involvement in the organization years before, to his claims that he did not know the organization was involved in terrorist activities, to his contention that the organization was not terrorist because its cause was just and its attacks comported with the international law of armed conflict.

Or another case involving the removal of a resident alien who left

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AAG Tony West's Remarks

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the U.S. in 1993 to live in a Palestinian refugee camp in Lebanon.

Following his return to the U.S. in 2007, the Lebanese sought his extradition based on his bomb-making activities for the Popular Front for the Liberation of Palestine. Although we have no extradition treaty with Lebanon, OIL attorneys successfully persuaded the Third Circuit to affirm his removal order which led to the alien's removal by ICE last May.

Now I know making the right calls in these cases is not often easy or always obvious.

These cases do not tend to fall neatly into pre-labeled buckets. And I know that, many times, there will be disagreement as to how certain cases should proceed, among agencies and even among attorneys within the DOJ. But I also know that there is no group who is better-trained, better-equipped or better-poised than you to grapple with these hard cases, to debate the facts and alternatives each case presents, and, in the end, to make the right judgments and strike the right balance. Because I learned long ago, early in my career as a lawyer, what dedicated public servants you, federal career employees, truly are.

Because you know that it strengthens our enforcement mission when we focus on cases that will result in removal rather than those that will not. You know it strengthens our legal arsenal when we pursue cases that will help us build solid precedent as opposed to weaker cases that may create bad law that may hinder our enforcement efforts. You know it strengthens our credibility with the bench and the public when we press forward on cases that reinforce faith in our ability to reasonably and appropriately exercise discretion.

We may not always be right, but I know you will always seek to do right. And in that endeavor I will back you; I will stand with you; and together, we will do our best to fulfill the promise of the oath we've taken, and our duty to the American people.

Thank you very much.

Violation of regulations: No, harm, no foul

(Continued from page 4)
ful than others, to strike a balance that upholds substantive rights and important procedural safeguards that inure to the benefit of individuals appearing before administrative agencies, while not paralyzing already-overburdened agencies with draconian punishment when agency officials violate more technical requirements.

Government litigators confronting these issues must carefully analyze the regulation that was allegedly violated, its genesis (grounded in the Constitution or federal law v. agency-created) and purpose in the regulatory scheme (conferring important procedural benefits to the alien v. promoting the orderly transaction of business) in order to tailor arguments to the test applied in their circuit. Lack of prejudice or, equally important, a lack of nexus between the underlying purpose of the regulation and the harm its violation allegedly caused, are also compelling arguments, where appropriate, for upholding agency action.

By Julia Tyler, OIL
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Contributions to the Immigration Litigation Bulletin Are Welcomed

INDEX TO CASES SUMMARIZED IN THIS ISSUE

NOTED: USCIS Holds First Military Naturalization Ceremony on Kandahar Airfield in Afghanistan

For the first time since U.S. military forces deployed to Afghanistan for Operation Enduring Freedom, 88 soldiers, sailors, airmen and Marines from 37 countries became citizens of the United States during a special naturalization ceremony on the Kandahar Airfield on Oct. 1, 2010. Before now, all naturalization ceremonies in Afghanistan have been held on the U.S. military airfield in Bagram.

Keeping with USCIS commitment to "bring immigration services to the troops wherever they serve," a three-member team from the USCIS Bangkok District Office traveled to Kandahar to complete the naturalization process and hold the ceremony close to the battlefields where the American forces serve.

Since 2004, when the overseas naturalization program began, USCIS has naturalized 583 members of the U.S. military deployed in Afghanistan.

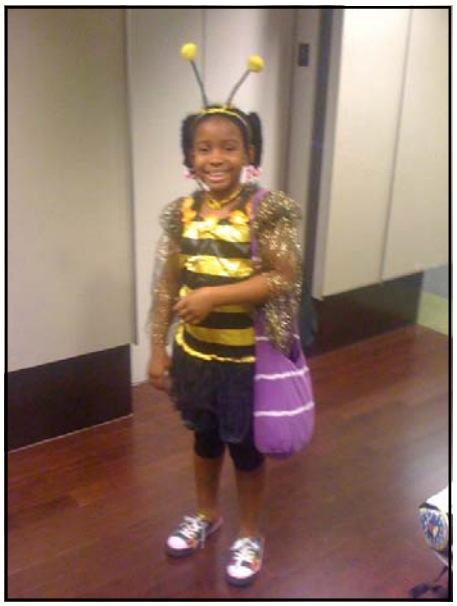
INSIDE OIL

OIL welcomes **Geoff Forney** from the District Court Section. In September 2008, Geoff joined the District Court Section where he litigated employment-based immigration issues under the Administrative Procedure Act, and defended the Department of Labor against challenges to the agency's legislative rulemaking. Prior to joining OIL, Geoff practiced immigration law in Philadelphia where he focused on employment-based immigrant and nonimmigrant issues, labor certification, and removal defense.

Corey Farrell recently returned to OIL after working for ICE as an Assistant Chief Counsel in Denver. She is a 2003 graduate of Oklahoma State University and received her J.D. from American University in 2006. Following law school, Corey was a trial attorney at OIL for several years before joining DHS. Welcome back Corey!

Corey Farrell, Geoff Forney

OIL celebrated Halloween by inviting the children of all OIL employees to trick-or-treat at the Liberty Square Bldg.



Kamiah Miller (7 years old), daughter of OIL secretary Krystle McLaughlin.

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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